Supreme Court, U.S.
FILED
DEC - 2 1999
OFFICE OF THE CLERK

No. 99-687

In The Supreme Court of the United States

ORTHOFIX S.R.L., INTER MEDICAL SUPPLIES LIMITED, AND ORTHOFIX INC.,
Petitioners,

v.

EBI MEDICAL SYSTEMS, INC., ELECTRO-BIOLOGY, INC., AND BIOMET, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

STEPHEN J. MARZEN *
WENDY E. ACKERMAN
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2604
(202) 508-8000
Counsel for Petitioners
* *Counsel of Record*

December 2, 1999

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. STANDARD OF APPELLATE REVIEW	1
II. CONSTITUTIONALITY OF LOW-RATIO PUNITIVE DAMAGES AWARDS THAT REQUIRE DEFENDANTS TO DISGORGE THE PROFITS OF THEIR UNLAWFUL CONDUCT	6
A. Constitutionality Of Low-Ratio Punitive Damages Awards	6
B. Constitutionality Of Punitive Damages Awards That Require Defendants To Disgorge The Profits Of Their Unlawful Conduct	8
III. REDUCTION OF CONSTITUTIONALLY EXCESSIVE AWARDS WITHOUT OFFERING THE PLAINTIFF THE OPTION OF A NEW TRIAL	9
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	6a

TABLE OF AUTHORITIES

CASES	Page
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)	1, 2, 5, 7
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989)	3-6
Continental Trend Resources, Inc. v. OXY USA, Inc., 101 F.3d 634 (10th Cir. 1996)	6
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996)	3-6
Hetzel v. Prince William County, 523 U.S. 208 (1998)	9-10
Honda Motor Co. v. Oberg, 512 U.S. 415 (1994)	6
Jackson v. Virginia, 443 U.S. 307 (1979)	6
Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999), *cert. denied*, 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252)	2, 10
Lee v. Edwards, 101 F.3d 805 (2d Cir. 1996)	2
Ornelas v. United States, 517 U.S. 690 (1996)	5
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991)	8-9
Patrick v. Burget, 486 U.S. 94 (1988)	1
Pavon v. Swift Transportation Co., 192 F.3d 902 (9th Cir. 1999)	2
TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)	9
United States v. Bajakajian, 524 U.S. 321 (1998)	5

CONSTITUTION	
U.S. CONST. Art. VI	5

FEDERAL STATUTES	
12 U.S.C. § 1715z-4a(c)	1a
15 U.S.C. § 15	1a
15 U.S.C. § 1117	1a
17 U.S.C. § 1203	1a
18 U.S.C. § 1964	1a
25 U.S.C. § 305e(a)(2)(A)	1a
31 U.S.C. § 3729	1a
35 U.S.C. § 284	1a

TABLE OF AUTHORITIES—Continued

	Page
FED. R. CIV. P. 50(a)(2)	4
FED. R. CIV. P. 50(b)	4
FED. R. CIV. P. 59(a)	3-4
FED. R. CIV. P. 59(e)	4
STATE STATUTES	
ALASKA STAT. § 09.17.20(c)(3) (West 1998)	6a
KAN. STAT. ANN. § 60-3701(b)(3) (1998)	6a
KY. REV. STAT. ANN. § 411.186(2)(c) (Banks-Baldwin 1998)	6a
MINN. STAT. § 549.20(3) (1998)	6a
MONT. CODE ANN. § 27-1-221(7)(b)(iv) (1977)	6a
N.J. STAT. ANN. § 2A:15-5.9 (1995)	6a
N.D. CENT. CODE § 32-03.2-11(5)(c)(2) (1999)	6a
OKLA. STAT. ANN. tit. 23, § 9.1A (West 1999)	7a
OR. REV. STAT. § 30.925(2)(c) (1998)	7a
MISCELLANEOUS	
JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 12.5 (2d ed. 1993)	4
11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818 (2d ed. 1995)	4

EBI devotes the first ten pages of its brief in opposition (Opp. 2-10) to telling this Court the same story it told the jury at trial—in the hope, apparently, that this Court will conclude that EBI does not deserve to be held liable for punitive damages. EBI's trial story, however, is flatly inconsistent with the facts of record in this case (*see* Orthofix's C.A. Br. 2-13); with the jury's Special Verdict, which found EBI liable for breaching three contracts and committing eight business torts (*see* Pet. App. 113a-22a); and with the firmly established rule that the evidence must be construed in support of the jury's verdict (*see Patrick v. Burget*, 486 U.S. 94, 98 n.3 (1988)). As the case comes to this Court, therefore, it is established that EBI acted with "actual malice" or "wanton and willful disregard of persons who foreseeably might be harmed" (Pet. App. 117a); that "the full [compensatory damages] award [of $48 million] is properly attributable to the tortious conduct" (Pet. App. 31a); and that EBI obtained $98 million in profits as a result of its unlawful conduct (Pet. App. 101a, 105-06a; App., *infra*, 2a-5a).

In the balance of its brief in opposition, EBI does not dispute that the three questions presented in the petition are worthy of this Court's review—if the lower courts are divided. It argues only (Opp. 11-24) that they are not and (with respect to the third question) that Orthofix waived its constitutional right to a new jury trial. EBI thus opposes this Court's review on exceedingly narrow grounds. This reply demonstrates that EBI is wrong on those grounds. Accordingly, the Court should grant the petition and resolve now the urgent questions that have arisen in the three years since it decided *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

I. STANDARD OF APPELLATE REVIEW

A. The petition (Pet. 14-15) explains that the decision of the Third Circuit conflicts with decisions of the Second and Ninth Circuits. EBI disagrees. Although EBI does not dispute that the Third Circuit applied an "intensive"

de novo standard of appellate review while the Second and Ninth Circuits applied an abuse-of-discretion standard, it insists that the courts were reviewing different things. *See* Opp. 12-13. Specifically, EBI says that the Third Circuit reviewed what it calls a "constitutional maximum determination" (Opp. 15) while the Second and Ninth Circuits reviewed a common-law "excessiveness" determination (Opp. 12). That is false.

The Second Circuit in *Lee v. Edwards,* 101 F.3d 805 (1996), determined the maximum constitutional level of the award, just as the Third Circuit did below. The Second Circuit set the maximum "punitive damage award of $75,000" and it did so in "light of the *Gore* factors." 101 F.3d at 813. Indeed, the Second Circuit spent five single-spaced pages applying the three *Gore* guideposts. *See id.* at 809-13.

Likewise, the Ninth Circuit in *Pavon v. Swift Transportation Co.*, 192 F.3d 902 (1999), adjudicated a "constitutional-maximum determination." It considered whether the punitive damages award in that case was excessive under the three *Gore* guideposts (*id.* at 909-10) and concluded that the constitutional maximum had not been exceeded because "*[t]he trial court did not abuse its discretion* in finding that this behavior was reprehensible enough to support the punitive damages awarded" (*id.* at 909 (emphasis added)). Accordingly, the standard of appellate review applied by the Third Circuit to "constitutional maximum determinations" conflicts directly with that applied by the Second and Ninth Circuits.

Furthermore, as explained in our petition (Pet. 15-16), the Third Circuit's decision also conflicts with the Eleventh Circuit's decision in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied,* 68 U.S.L.W. 3244 (U.S. Oct. 12, 1999) (No. 99-252). The Eleventh Circuit applies a hybrid standard under which the ultimate excessiveness determination is

reviewed *de novo*, but reprehensibility findings receive deference. *See* 170 F.3d at 1335. EBI contends that the appeal in this case would have come out the same in the Eleventh Circuit and states that that court "reduced an award despite specific jury findings of bad intent." Opp. 15. That, too, is false. The Eleventh Circuit did *not* reduce the punitive damages award; it instead affirmed the district court's remittitur, even though the remitted award was 100 times the amount of compensatory damages. Unlike the Third Circuit, the Eleventh Circuit deferred to the district court's reprehensibility determination (170 F.3d at 1336) and its assessment of the amount of punitive damages such reprehensible conduct merited (*see id.* at 1339). Thus, as *Amici Curiae* Professors Erwin Chemerinsky and Arthur F. McEvoy conclude, the Eleventh Circuit's and Third Circuit's standards conflict: "[t]he appellate review standard applied by the Third Circuit in its decision below is even more aberrant and in conflict with the fundamental strictures on the scope of appellate review than the Eleventh Circuit's approach." Brief of Erwin Chemerinsky and Arthur F. McEvoy as *Amici Curiae* in Support of Petitioners 16.

B. The petition (Pet. 17-18) also explains that the Third Circuit's decision is in tension with this Court's decisions in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279-80 (1989), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 438-39 (1996). Again, EBI does not dispute that this Court applied an abuse-of-discretion standard in those cases and that the Third Circuit applied a *de novo* standard of review here. EBI contends only that the courts reviewed different things.

EBI's contention rests on a series of purported distinctions—none of which has any significance for the standard of appellate review. EBI observes that *"Gasperini* and *Browning-Ferris* both involved only Rule 59(a) excessive-

ness assessments." Opp. 14. But excessiveness assessments almost always arise on motions for new trial under Federal Rule of Civil Procedure 59(a). Excessiveness challenges cannot arise on motions for judgment as a matter of law under Rule 50, because such motions must be made "before submission of the case to the jury" (FED. R. CIV. P. 50(a)(2)) and a defendant cannot challenge as excessive a verdict that has not yet been rendered.[1] Indeed, EBI necessarily brought its own excessiveness challenge by new-trial motion under Rule 59(a), because it did not move for judgment as a matter of law on excessiveness under Rule 50 at trial (*see* C.A. App. 1376-1406), and did not move to alter or amend the judgment after trial under Rule 59(e) (*see* C.A. App. 1407-55).[2]

Nor can EBI distinguish *Browning-Ferris* and *Gasperini* (or any other excessiveness case, for that matter) from a due process challenge to a punitive damages award by labeling the former an "excessiveness" determination and the latter a "constitutional-maximum determination." Opp. 15. In adjudicating an excessiveness challenge, a reviewing court is free to state the maximum permissible award (and order the plaintiff to remit the excess or retry

---

1 Although motions for judgment as a matter of law may be "renewe[d]" after entry of judgment (FED. R. CIV. P. 50(b)), "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion" "to avoid any question arising under the Seventh Amendment." FED. R. CIV. P. 50(b) advisory committee's note (1991).

2 Contrary to EBI's suggestion (Opp. 12 n.6), it does not appear that an excessiveness challenge can be made by a motion to alter or amend judgment under Rule 59(e). *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 12.5, at 572 (2d ed. 1993) ("[A] motion to alter the judgment" cannot involve "a reduction in an award."). Even if it could, however, "the standard of reviewing an order on a motion to alter or amend a judgment is relatively well settled. The district court judge's decision granting or denying a Rule 59(e) motion is reviewed for abuse of discretion." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2818, at 197-98 (2d ed. 1995).

its case) or alternatively to state that the award is excessive (and order the district court to determine the appropriate remittitur on remand). The "constitutional" nature of a *Gore* challenge does not limit a court to the former remedy—*i.e.*, a "maximum determination." Indeed, in *Gore* itself this Court decided only that "the grossly excessive award imposed in this case transcends the constitutional limit" and remanded to the state court to determine "the appropriate remedy." 517 U.S. at 585-86.

The *only* difference between the excessiveness determination by the Third Circuit below and by this Court in *Browning-Ferris* and *Gasperini* is the substantive law by which excessiveness is measured: the Due Process Clause (Third Circuit), state common law (*Browning-Ferris*), and state statute (*Gasperini*). EBI offers no reason why the standard of appellate review should turn on the source of the substantive-law yardstick for excessiveness. All are "law." That the federal Constitution is the "supreme Law of the Land" (U.S. CONST. Art. VI) does not make questions arising under it any more "legal"—or any more susceptible of *de novo* review—than those arising under state common law or a statute enacted by a state legislature. What is more, that the Constitution supplies the measure of excessiveness does not make any less applicable the reasons this Court gave for reviewing excessiveness challenges arising under state common law and state statute for abuse of discretion—namely, long-standing historical practice, the "limited function" of federal appellate courts, and "the strictures of the Seventh Amendment." *Browning-Ferris*, 492 U.S. at 280 n.26; *Gasperini*, 518 U.S. at 438.[3] The Second and Ninth Circuits agree that the standard of appellate review does not turn on the

---

[3] By contrast (Opp. 17-18), those considerations are inapplicable to judicially assessed criminal forfeitures (*see United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998)) and magistrates' Fourth Amendment probable-cause determinations (*see Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

source of the law by which excessiveness is measured. The former circuit reviews "constitutional maximum determinations" for abuse of discretion on the authority of this Court's decision in *Gasperini*. *See* 101 F.3d at 808-09. The latter circuit does the same on the authority of this Court's decision in *Browning-Ferris*. *See* 192 F.3d at 909.

In sum, EBI cannot reconcile the Third Circuit's "intensive" *de novo* standard of review with the abuse-of-discretion standard of review adopted by the Second Circuit, the Ninth Circuit, and this Court.[4] For the reasons stated in our petition (Pet. 18-20), which EBI does not dispute, that conflict merits this Court's review.[5]

II. CONSTITUTIONALITY OF LOW-RATIO PUNITIVE DAMAGES AWARDS THAT REQUIRE DEFENDANTS TO DISGORGE THE PROFITS OF THEIR UNLAWFUL CONDUCT

A. Constitutionality Of Low-Ratio Punitive Damages Awards

The petition (Pet. 21-22 & nn.11-12) brought to this Court's attention the recent empirical evidence that high- and low-ratio punitive damages awards have increased

---

[4] That conflict did not exist at the time this Court denied the petition for a writ of certiorari in *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 520 U.S. 1241 (1997). *See* Opp. 16 n.7.

[5] Contrary to EBI's attempted preemptive strike (Opp. 11), if the Court grants review, it will have before it not only the standard of appellate review, but also the antecedent substantive standard. This case thus allows the Court to decide the question it reserved in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994)—namely, whether the Due Process Clause is satisfied by review of the jury's award for rationality similar to the review required by *Jackson v. Virginia*, 443 U.S. 307, 317-20, 324 (1979). As *Amici Curiae* Professors Chemerinsky and McEvoy point out (Br. 2-3, 12-18), the lower courts are divided on that standard as well. The Third Circuit's "intensive" *de novo* review is not consistent with rational-fact-finder review. *See id.* at 16-18.

after *Gore* and that a growing number of courts are striking down low-ratio awards. That evidence should trouble the Court because it suggests that *Gore* may be having the exact opposite of the effect intended: judicial intervention is increasing disparities by increasing the incidence of high- and low-ratio awards.

Ironically, the increasing disparities are even more disturbing in low-ratio awards than in high-ratio awards. The latter suggests that some portion of the problem that drew the Court into substantive-due-process review of punitive damages awards remains. The former suggests that courts are using *Gore* in *Lochner*-like fashion to reduce low-ratio awards with which they disagree. As intimated in the petition (Pet. 24-25), if the decision below is left undisturbed, its reduction of a punitive damages award from a ratio of 1:1 to the actual damages to a ratio of .02:1 will stand as precedent for as-applied challenges to antitrust and other multiple damages statutes in future cases. *See* App., *infra*, at 1a (listing statutes).

EBI takes no issue with our understanding of the problem or its importance. EBI states only that the disparities are a necessary result of *Gore*. *See* Opp. 18-19. That is a merits point and can be taken up if this Court grants plenary review. For now, it suffices to note that constitutionally based reductions of low-ratio awards are flatly inconsistent with the "fair notice" rationale of *Gore*.[6]

---

[6] Although EBI is correct (Opp. 18) that this Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula" (*Gore*, 517 U.S. at 582), that line is the maximum amount of punitive damages the Due Process Clause would allow, not the minimum. This Court predicated its due-process analysis on "[e]lementary notions of fairness" that a person receive notice of the "severity of the penalty that a State may impose" (*id.* at 574) and cited numerous laws extending back to 1275 that gave notice of "double, treble, or quadruple damages" (*id.* at 581). From that reasoning it follows that a defendant has fair notice as a matter of law of a punitive damages award that is equal to the amount of compensatory damages, as was the case here.

B. Constitutionality Of Punitive Damages Awards That Require Defendants To Disgorge The Profits Of Their Unlawful Conduct

EBI argues that "[n]o issue as to the role of a defendant's profits is presented by the Third Circuit's decision," because neither "the district court [n]or the jury accepted [Orthofix's unjust enrichment] evidence"; moreover, the jury must have "*rejected*" that evidence because there is "nothing to indicate" that Orthofix's lost profits should differ from EBI's unjust enrichment. Opp. 20 (emphasis in original). EBI's recitation of the record is demonstrably wrong.

At trial, EBI did not dispute Orthofix's unjust enrichment evidence. EBI's trial strategy was to admit the value of Orthofix's U.S. market (to be consistent with the damages theory on its counterclaim for the loss of its Orthofix "franchise" under the New Jersey Franchise Practices Act) and to dispute that Orthofix's new sales force could retain all of its customers. *See* Pet. 4 n.2. As a result, the parties did not dispute the $97.7 million unjust enrichment figure. *See id.* & App., *infra*, at 2a-5a. The jury could not help but accept Orthofix's unjust enrichment evidence, since there was no contrary testimony. The district court relied on that evidence (Pet. App. 101a, 105a-06a) as the principled basis on which to remit the punitive damages award to $50 million, which provided a total award of $98 million and removed EBI's unjust enrichment. The fact that the jury did not award the full amount of Orthofix's lost profits shows only that it believed Orthofix would not have been able to retain its entire U.S. market, not that that market (unjustly obtained by EBI) was worth less than $98 million.

The Third Circuit's refusal to affirm the punitive damages award and deprive EBI of the profits obtained from its unlawful conduct conflicts in principle with this Court's decisions in *Pacific Mutual Life Insurance Co. v. Haslip*,

499 U.S. 1, 22 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 461-62 (1993) (Pet. 26); conflicts with decisions of other federal courts and state supreme courts (Pet. 26 n.16); effectively invalidates the unjust enrichment element in the tort reform statutes of New Jersey and eight other states (Pet. 26-27 and App., *infra*, at 6a-7a); and undercuts an essential deterrent to malicious conduct (Pet. 27). EBI does not dispute that analysis.

III. REDUCTION OF CONSTITUTIONALLY EXCESSIVE AWARDS WITHOUT OFFERING THE PLAINTIFF THE OPTION OF A NEW TRIAL

A. EBI's contention that Orthofix waived its constitutional right to a new trial, in reliance on generic "pressed or passed on" cases (Opp. 21-22), ignores this Court's dispositive decision in *Hetzel v. Prince William County*, 523 U.S. 208, 118 S. Ct. 1210, 1211 n.2 (1998) (per curiam). There, respondent argued (more reasonably than EBI here) that petitioner should have raised the Seventh Amendment question in her prior certiorari petition (as Orthofix has done here), rather than in a new-trial motion on remand in the district court. *See id.* This Court rejected respondent's argument. It held that petitioner did not have to anticipate that she would be denied "the option of a new trial" because that "would require petitioner to assume a deviation from normal practice and an action by the Court of Appeals that at minimum implicated constitutional concerns." *Id.*

So too, here, Orthofix could not have been expected to anticipate that the Third Circuit would order a reduction in punitive damages without offering it a new trial. The district court held that it could not "merely order a reduction in the award" and offered Orthofix a new trial on punitive damages. Pet. App. 106a. On appeal, EBI never suggested that the remitted award could be reduced without offering Orthofix a new trial. Indeed, EBI never

asked for a reduced award, but instead argued that it should be "vacated or, at a minimum, remanded for a new trial." Opp. 8 (quoting EBI's C.A. Br. 39). Orthofix's preservation of its constitutional right to a new jury trial follows *a fortiori* from *Hetzel*.

B. EBI's argument (Opp. 22-23) that the decision below complies with *Hetzel* rests on the same non-distinction between "traditional common-law excessiveness determinations" and constitutional-maximum determinations. Moreover, its argument that "[t]here is no intercircuit conflict" (Opp. 23) is not correct. The Eleventh Circuit in *Johansen* candidly admitted the conflict when it explained that the Second and Tenth Circuits "have recently decided to continue to offer the plaintiff, whose verdict has been found to be *constitutionally excessive*, a choice between a reduced verdict and a new trial to 'avoid any conflict with the Seventh Amendment.'" 170 F.3d at 1332 (emphasis added; quoting *Continental Trend Resources Inc.*, 101 F.3d at 643).[7]

CONCLUSION

For the foregoing reasons and those stated in our petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

STEPHEN J. MARZEN *
WENDY E. ACKERMAN
SHEARMAN & STERLING
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2604
(202) 508-8000
Counsel for Petitioners
* *Counsel of Record*

December 2, 1999

[7] EBI reads the same passage to say that the new trial offer was merely "preferable." Opp. 23. EBI fails to disclose that the Tenth Circuit preferred that course to "avoid any conflict with the Seventh Amendment." 101 F.3d at 643.

APPENDICES

APPENDIX A

SELECTED FEDERAL STATUTES THAT MULTIPLY THE AWARD OF COMPENSATORY DAMAGES

National Housing Act, 12 U.S.C. § 1715z-4a(c) (authorizing double damages for unauthorized use of multifamily housing project assets and income).

Clayton Act, 15 U.S.C. § 15 (mandating treble damages for violation of antitrust laws).

Lanham Trademark Act, 15 U.S.C. § 1117 (mandating treble damages for intentional trademark infringement).

Copyright Act, 17 U.S.C. § 1203 (authorizing treble damages for repeated circumvention or violation of copyright protection systems).

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (mandating that injured person recover treble damages).

Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e (a)(2)(A) (authorizing treble damages for misidentification of Indian produced goods).

False Claims Act, 31 U.S.C. § 3729 (mandating treble damages for false claims against the United States).

Patent Act, 35 U.S.C. § 284 (authorizing up to treble damages for patent infringement).

APPENDIX B

EXCERPTS FROM TRIAL TRANSCRIPT ON EBI'S PROFITS FROM ITS UNLAWFUL CONDUCT

Testimony of Orthofix's damages expert, Creighton Hoffman, during Orthofix's case in chief, 5/21/97 Tr. 1280:5-11 (C.A. App. 726):

THE WITNESS [MR. HOFFMAN]: Okay, I basically computed the damages two different ways. I've looked at unjust enrichment and I've looked at the—and basically unjust enrichment, I mean the additional profits that EBI Biomet made as a result of the actions that have been alleged here. And I've calculated unjust enrichment as being approximately 97 million dollars.

For the full explanation of the methodology used by Orthofix's damages expert to calculate EBI's unjust enrichment, see the testimony of Creighton Hoffman during Orthofix's case in chief, 5/21/97 Tr. 1301:18-1311:14 and PX-480 to 485 and PX-488 (C.A. App. 747-57).

Further testimony of Creighton Hoffman during Orthofix's case in chief, 5/21/97 Tr. 1313:10-18 (C.A. App. 759):

BY MR. MARZEN:

Q. Mr. Hoffman, before lunch I asked you about the amount by which EBI had been—has been unjustly enriched. Do you remember that?

A. That's correct. That's what these charts were intended to show.

Q. And the amount itself is on the summary of damages chart and it's in round numbers about, 98 million dollars?

A. Absolutely, 97.7 million dollars.

Testimony of Orthofix's damages expert, Creighton Hoffman, during Orthofix's rebuttal case, 5/21/97 Tr. 4525:3-9 (C.A. App. 1068):

[MR. HOFFMAN:] I then stepped back and did a wholly separate calculation to determine how much EBI had been enriched as a result of that, how big a stack of chips did they have on their side of the table, that really shouldn't be there if they had not done the things that had been alleged. And that came to just a little bit less than 98 million dollars, as I recall the numbers.

Further testimony of Creighton Hoffman during Orthofix's rebuttal case, 5/21/97 Tr. 4533:4-10 (C.A. App. 1785):

Q. [BY MR. MARZEN:] Mr. Hoffman, does Mr. Malackowski [EBI's damages expert] suggest similar adjustments to your 98 million dollars unjust enrichment figure?

A. [BY MR. HOFFMAN:] No, there was no similar sort of chart or table put forward yesterday, or I've got Mr. Malackowski's trial book with all of his exhibits, and there was nothing like this that deals with the unjust enrichment, the 97 million.

Further testimony of Creighton Hoffman during Orthofix's rebuttal case, 5/22/97 Tr. 4581:10-16 (C.A. App. 1824):

Q. [BY MR. MARZEN:] Can we turn now from a discussion of lost profits back to unjust enrichment. Is it your testimony, Mr. Hoffman, that, or your understanding that Mr. Malackowski does not really disagree with your calculation of unjust enrichment? And by that I mean the 98 million dollar figure?

A. [BY MR. HOFFMAN:] He made no adjustment to my 98 million dollar figure at all in his book or in his testimony.

The district court's ruling on counsels' reference to the unjust enrichment testimony in summation, 5/23/97 Tr. 4787:23-25 (C.A. App. 1122-23):

THE COURT: Well, I am going to rule that the verbiage, the term unjust enrichment will not be pronounced in front of the jury. You may comment upon the evidence that was presented with respect to how those figures or those calculations bear upon the question of lost profits, and obviously you may comment upon lost profits or the profitability of the defendants' conduct with respect to the punitive damage claim. But you may not use the words unjust enrichment.

And I will tell the jury, I will instruct the jury without identifying what the issues are, I will tell the jury that certain issues are going to be decided by the Court and that they need not be concerned about them, and they need not speculate upon what they are. I will not identify the issues before the jury.

Summation by Orthofix's counsel, 5/28/97 Tr. 5259: 1-11 (C.A. App. 1176):

But there are a couple of interesting things about Mr. Malackowski. He does not criticize this lost profit, this EBI profit number. He raised some issues about whether some of it's past and some of it's future, but he did not try to break that number apart and show you problems with that number, he only criticized this number [Orthofix's lost profits]. And that's because Mr. Malackowski recognizes that a business that's generating 25 to 30 million dollars a year in sales is worth 98 million dollars. That's the figure. That is the benefit that EBI has enjoyed as a result of this illegal activity.

Rebuttal summation by Orthofix's counsel, 5/29/97 Tr. 5350:25-5351:2 (C.A. App. 1186-87):

He [Mr. Malackowski] certainly didn't quarrel with the 98 million dollar number as EBI's profits in this.

Further rebuttal summation by Orthofix's counsel, 5/29/97 Tr. 5353:4-8 (C.A. App. 1189):

These are the kinds of activities, ladies and gentlemen, that warrant an award of punitive damages. And in doing that, in calculating that, you can consider the amount that they gained, the 98 million.

APPENDIX C

STATE TORT REFORM STATUTES THAT CONSIDER THE PROFITABILITY OF THE DEFENDANT'S UNLAWFUL CONDUCT IN SETTING THE AMOUNT OF PUNITIVE DAMAGES

ALASKA STAT. § 09.17.20(c)(3) (West 1998): "[T]he fact finder may consider . . . the amount of financial gain the defendant gained or expected to gain as a result of the defendant's conduct."

KAN. STAT. ANN. § 60-3701(b)(3) (1998): "[T]he court may consider . . . the profitability of the defendant's misconduct."

KY. REV. STAT. ANN. § 411.186(2)(c) (Banks-Baldwin 1998): "[T]he trier of fact should consider the following factors: . . . the profitability of the misconduct to the defendant."

MINN. STAT. § 549.20(3) (1998): "Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including . . . the profitability of the misconduct to the defendant."

MONT. CODE ANN. § 27-1-221(7)(b)(iv) (1997): "[T]he judge shall . . . demonstrat[e] . . . consideration of each of the following matters . . . the profitability of the defendant's wrongdoing, if applicable."

N.J. STAT. ANN. § 2A:15-5.9 (1995): "[T]he trier of fact is to consider . . . the profitability of the misconduct."

N.D. CENT. CODE § 32-03.2-11(5)(c)(2) (1999): "[T]he finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors: . . . the profitability to the defendant of the wrongful conduct

and the desirability of removing that profit and of having the defendant also sustain a loss."

OKLA. STAT. ANN. tit. 23, § 9.1A (West 1999): "[T]he jury, . . . may, . . . , give damages . . . based on the following factors: . . . the profitability of the misconduct to the defendant."

OR. REV. STAT. § 30.925(2)(c) (1998): "Punitive damages, if any, shall be determined and awarded based on the following criteria: . . . the profitability of the defendant's misconduct."